FILED BY CLERK
FEB 15 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, Appellant, v. JOSE L. and JOSE L., Appellees.	2 CA-JV 2010-0102 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J18806400

Honorable Javier Chon-Lopez, Judge

VACATED AND REMANDED

Thomas C. Horne, Arizona Attorney General
By Michelle R. Nimmo
Tucson
Attorneys for Appellant Arizona Department of Economic Security

The Hopkins Law Office, P.C.
By Cedric Martin Hopkins
Tucson
Attorney for Appellee

B R A M M E R, Presiding Judge.

¶1 The Arizona Department of Economic Security (ADES) appeals from the juvenile court's order denying ADES's motion to terminate Jose L.'s parental rights to his eight-year-old son, J.L. ADES maintains the court's denial of its motion resulted from an erroneous application of the law relevant to abandonment, the statutory ground for termination alleged. *See* A.R.S. § 8-533(B)(1). For the following reasons, we agree. We therefore vacate the court's order and remand the case for reconsideration of ADES's motion under the correct legal standards.

¶2 To prevail on its motion to terminate Jose's parental rights, ADES was required to prove abandonment by clear and convincing evidence and to establish by a preponderance of the evidence that termination was in J.L.'s best interests. *See Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 1, 41, 110 P.3d 1013, 1014, 1022 (2005). We view the facts in the light most favorable to sustaining a juvenile court's denial of a motion to terminate parental rights, and we will not disturb that ruling unless the court has abused its discretion. *Kenneth B. v. Tina B.*, 226 Ariz. 33, ¶ 12, 243 P.3d 636, 639 (App. 2010). But an abuse of discretion includes an error of law, *see In re Nickolas T.*, 223 Ariz. 403, ¶ 4, 224 P.3d 219, 220 (App. 2010), and "we review de novo any issues of law, including the interpretation of a statute," *Kenneth B.*, 226 Ariz. 33, ¶ 12, 243 P.3d at 639.

¶3 One of the statutory grounds warranting termination of parental rights is a finding "[t]hat the parent has abandoned the child." § 8-533(B)(1). According to A.R.S. § 8-531(1):

> "Abandonment" means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

In its motion, ADES alleged Jose "abandoned the child in that he has failed to maintain a normal parental relationship with the child and failed to provide reasonable support and to maintain regular contact with the child, including providing normal supervision." ADES further asserted, "Jose . . . has paid no support, sent no cards, gifts or letters, and has never visited the child."

¶4 It is undisputed Jose was never married to J.L.'s mother, Tina G., nor was he listed on J.L.'s birth certificate as the child's father. Addressing ADES's allegations of abandonment in its under-advisement ruling, the juvenile court provided the following summary of evidence presented at the contested termination hearing:

> [J.L.] was born in California in [August] 2002, while [Jose] was incarcerated. Following his release, [Jose] visited with [J.L.] at the home of [Tina] and [her boyfriend]. At some point between March 2004 and February 2006, [Tina] and [her boyfriend] moved to Tucson. [Jose] testified that he had no contact information for [Tina] and no knowledge of where she and [J.L.] were, although he tried to get that information from her relatives. According to [Jose], he eventually made contact with [Tina] in fall of 2008 via an online social networking site and made inquiries about [J.L.]. [Tina] telephoned [Jose] and discussed [J.L.], but refused to give him her phone number and did not tell him that [J.L.] was no longer in her custody.
>
> ADES served [Jose] with the dependency petition as to [J.L.] in January 2009. [Jose] attempted to arrange visitation with his son in January 2009, but ADES told him that he first needed to establish paternity. He missed two DNA tests in February 2009 and March 2009. In May 2009, he admitted to the Third Amended Dependency Petition, including the admission that he had not maintained a relationship with his son and had failed to protect him from the mother's neglect. He established paternity by affidavit in September 2009. At that point, he renewed his request for visitation, but was told he could not have any until it was therapeutically recommended . . . .

¶5 The juvenile court further stated Jose had not provided child support for J.L., even after Child Protective Services (CPS) had requested such payments, and found "[Jose] could have done much more in this case, including DNA testing in a more timely fashion and providing child support." The court also recognized that an unwed father wishing to avoid a finding of abandonment "must act persistently" to bond with his child and "must vigorously assert his legal rights to the extent necessary." *In re Pima County Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994). The court then found Jose had "persisted in trying to re-establish a connection with [J.L.]," noting Jose "did visit [J.L.] in California" before Tina moved to Arizona and had sought visitation after he was notified of the dependency proceeding.[1] Relying on *Marina P. v. Arizona Department of Economic Security*, 214 Ariz. 326, 152 P.3d 1209 (App. 2007), the court concluded its decision to terminate parental rights must be based on "'those circumstances existing at the time of the severance' that prevent a parent from being able to appropriately provide for his or her children." *Id.* ¶ 22 (citation omitted). In considering such circumstances, the court reasoned that Jose "had a stable job, a wife, and a good parental relationship with his stepson" and that, "[a]lthough [Jose] and [J.L.] do not currently have a relationship, [Jose] is capable of providing for [J.L.]." Declining to find the statutory ground for abandonment, the court also rejected ADES's argument

[1]ADES disputes the juvenile court's finding that "[t]he fact that [Jose] has not had any visits with [J.L.] since establishing paternity cannot be blamed on [Jose]." As ADES points out, although the court stated in its ruling that Jose's April motion for visitation had been denied because of its proximity to the scheduled termination hearing, the order denying visitation was expressly based, at least in part, on the finding that visitation would not be therapeutic for J.L., who had been raised by Tina's boyfriend and was in the process of adjusting to his placement with foster parents.

that termination of Jose's rights was in J.L's best interests, dismissing suggestions about potential adoptive placement of J.L. as speculative.[2]

¶6 On appeal, ADES maintains the juvenile court erred in its application of relevant law and erroneously failed to find abandonment had been proven as a ground for termination. Contending that consideration of J.L.'s best interests also was affected by this error, ADES asks that we vacate the court's ruling and remand the case for further proceedings.

¶7 Relying on the court's correct statement that "abandonment is measured not by a parent's subjective intent, but by the parent's conduct," *Michael J. v. Ariz. Dep't. of Econ. Sec.*, 196 Ariz. 246, ¶ 18, 995 P.2d 682, 685 (2000), Jose argues in response that "the court knew and correctly applied the law." According to Jose, reasonable evidence supported the court's implicit ruling that ADES had failed to prove abandonment. He maintains ADES's argument regarding best interests also must fail, because it is premised on ADES's claim that the court erred in failing to find abandonment and, he argues, that ruling "was not erroneous."

¶8 We address in turn the juvenile court's resolution of the statutory ground of abandonment and the issue of best interests. Because "the best interests of the child could be a sufficient reason for a denial of termination," *In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990), we address that aspect of the court's ruling first.

Best Interests

¶9 As the juvenile court noted in its ruling, "[A] finding of the statutory grounds of abandonment standing alone does not permit termination of parental rights. A severance must also be in the best interests of the child." *Id.* at 4, 804 P.2d at 733. In

[2]Although J.L. remained dependent after the termination hearing, ADES had withdrawn its motion to terminate Tina's parental rights, without prejudice, in order to provide her with a neuropsychological evaluation.

addressing the relationship between the finding of a statutory ground for termination and the best interests of the child, Division One of this court has observed, "In most cases, the presence of a statutory ground will have a negative effect on the children." *Maricopa County Juv. Action No. JS-6831*, 155 Ariz. 556, 559, 748 P.2d 785, 788 (App. 1988). But, because this will not always be true, "a determination of the child's best interest must include a finding as to how the child would benefit from a severance *or* be harmed by the continuation of the relationship." *Maricopa County No. JS-500274*, 167 Ariz. at 5, 804 P.2d at 734. Thus, "it becomes necessary for the juvenile court to weigh the overall best interests of the child against the objective behavior of the parent which constitutes the statutory ground." *Maricopa County No. JS-6831*, 155 Ariz. at 559, 748 P.2d at 788. ADES maintains that, having failed to find the statutory ground of abandonment, the court "could not have engaged in any weighing of the negative effect of [Jose's] abandonment" to determine whether termination would benefit J.L. or whether continuing the relationship would harm the child.

¶10 On review, we are persuaded the record supports ADES's contention. ADES argued at the termination hearing that "detriment to the child [from continuation of a parental relationship] is also a basis" for a best-interests finding and that "plenty of evidence" supported a finding that J.L. would be harmed by "this relationship that doesn't even exist, actually." But in its ruling, the juvenile court addressed only ADES's argument that J.L. would be benefitted by his placement in an adoptive home with his half-siblings, finding that argument was speculative when no pending motion sought termination of Tina's rights.

¶11 As discussed below, we conclude the juvenile court failed to apply the correct legal standards to determine whether Jose has abandoned J.L. Because the court's resolution of abandonment under the legal principles we identify in this decision may also affect the determination of J.L.'s best interests, we vacate the court's ruling denying ADES's motion and remand the matter for reconsideration of both issues.

Abandonment

¶12 Absent evidence to the contrary, we presume the juvenile court knew and correctly applied the law. *See State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997). Nonetheless, we agree with ADES that, although some of the statements of law in the court's ruling are correct, the court appears to have construed those statements in the context of applying the "settled purpose doctrine" and "conscious disregard test."[3] *Michael J.*, 196 Ariz. 246, n.2, 995 P.2d at 685 n.2. Those legal standards were employed before the legislature revised the definition of abandonment in 1994 and, in *Michael J.*, our supreme court expressly rejected both common law tests "in favor of the statutory definition." *Id.* ¶¶ 16, 17, 19; *see also Pima County No. S-114487*, 179 Ariz. at 95-97, 876 P.2d at 1130-32 (first rejecting settled purpose and conscious disregard tests for "termination proceedings against an unwed father with no parental relationship");

[3]In its order, the juvenile court stated,

> Under Arizona law, abandonment as ground for termination of parental requires "clear and convincing evidence of intentional conduct on part of parent that evinces settled purpose to forego all parental duties and relinquish all parental claims to child." *Matter of Appeal in Maricopa County Juvenile Action No. JS-501568*, 177 Ariz. 571, 869 P.2d 1224 (App. Div. 1, 1994.) Intent to forego parental duties and claims is not required, only intentional conduct which, when considered objectively, implies conscious disregard of parental obligation. *Id.* The appropriate test is whether there has been "conscious disregard of obligations owed by parent to child, leading to destruction of parent-child relationship." *Matter of Appeal In Pima County Severance Action No. S-1607*, 147 Ariz. 237, 709 P.2d 871 (1985); *Matter of Appeal in Pima County Juvenile Action No. S-1182*, [136 Ariz. 432,] 666 P.2d 532 (App. Div. 2, 1983). In [an] action to sever parental rights, abandonment is measured not by a parent's subjective intent, but by the parent's conduct. *Michael J. v. Ariz. Dep't. of Econ. Sec.*, 196 Ariz. 246, 995 P.2d 682 (2000).

Kenneth B., 226 Ariz. 33, ¶¶ 15-16, 243 P.3d at 639 (recognizing change in law). Thus, the proper inquiry under current law is "whether a parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship." *Michael J.*, 196 Ariz. 246, ¶ 18, 995 P.2d at 685-86; *see also* § 8-531(1).

¶13 We also agree with ADES that, in considering whether ADES had met its burden, the juvenile court appears to have misconstrued other Arizona authorities, including *Marina P.* and cases addressing the persistence required of unwed fathers who seek to avoid judicial findings of abandonment. In *Marina P.*, 214 Ariz. 326, ¶ 12, 152 P.3d at 1211, ADES had sought termination of a mother's parental rights on the sole ground that her children "ha[d] been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order . . . and [she] ha[d] substantially neglected or wil[l]fully refused to remedy the circumstances" that caused such placement. § 8-533(B)(8)(a). Referring to the specific language of this time-in-care ground for termination, the court in *Marina P.* concluded a court must identify "the circumstances that cause the child to be in an out-of-home placement," § 8-533(B)(8)(a), in order to determine whether a parent has neglected or refused to remedy them. *Id.* ¶¶ 22-23. The court stated, "[W]e construe those circumstances, as we have in similar contexts, 'to mean those circumstances existing at the time of the severance' that prevent a parent from being able to appropriately provide for his or her children." *Id.* ¶ 22, *quoting In re Maricopa County Juv. Action No. JS-8441*, 175 Ariz. 463, 468, 857 P.2d 1317, 1322 (App. 1993) (construing parent's inability to remedy "circumstances which cause the child to be in an out-of-home placement" for purpose of former § 8-533(B)(6)[4]), *abrogated on other grounds by Kent K.*, 210 Ariz. 279, ¶¶ 12, 22, 110 P.3d at 1016, 1018.

[4]1988 Ariz. Sess. Laws, ch. 50, § 1, *see now* § 8-533(B)(8)(c).

¶14 But, in contrast to the time-in-care grounds for termination found in § 8-533(B)(8) and considered in *Marina P.*, which require the court to find a parent has failed or refused to remedy the cause of out-of-home placement, § 8-533(B)(1) contains no provision allowing a parent to redeem his abandonment of a child by remedying disabling circumstances. Section 8-533(B)(1) requires only that the court find "[t]hat the parent has abandoned the child." Moreover, § 8-531(1) provides that a parent's "[f]ailure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment." Although a parent's current circumstances may be relevant to a determination of a child's best interests, our supreme court has stated that a prima facie case of abandonment is not "rebutted merely by post-petition attempts to reestablish a parental relationship." *Maricopa County No. JS-500274*, 167 Ariz. at 8, 804 P.2d at 737; *see also In re Maricopa County, Juv. Action No. JS-1363*, 115 Ariz. 600, 601, 566 P.2d 1346, 1347 (App. 1977) (same). Accordingly, we agree with ADES that the juvenile court erred in considering Jose's circumstances at the time of the termination hearing as evidence he had not abandoned J.L.

¶15 Moreover, although we recognize a determination of "reasonable support, regular contact, and normal supervision varies from case to case," *Pima County No. S-114487*, 179 Ariz. at 96, 876 P.2d at 1131, and involves questions of fact appropriately resolved by the juvenile court, *Michael J.*, 196 Ariz. 246, ¶ 20, 995 P.2d at 686, its mistaken consideration of Jose's current circumstances may have influenced its other findings. In particular, ADES challenges the court's finding that Jose's recent efforts to obtain visitation with J.L., along with his visits in California between J.L.'s first and second birthdays, provided evidence of the persistence required of an unwed father if he is to avoid a finding of abandonment. Even if consideration of Jose's recent efforts was not foreclosed by *Maricopa County No. JS-500274*, we agree with ADES that the court's finding that Jose was sufficiently persistent to protect his parental rights, based on the evidence cited by the court, is inconsistent with Arizona law.

¶16 In *Pima County Action No. S-114487*, 179 Ariz. 86, 90, 101, 876 P.2d 1121, 1125, 1136, our supreme court affirmed termination of an unwed father's parental rights after the child's mother placed the newborn in an adoptive home without his consent. Approximately six months after the child was placed, an attorney for the adoptive parents filed a petition to terminate the father's parental rights on the ground of abandonment. *Id.* at 91, 876 P.2d at 1126. Finding the father had failed to communicate with or about the child or provide support, and had asserted his legal rights only in response to the termination petition, the court explained that an unwed father having no "immediate and obvious legal ties" to his child must take "immediate and persistent actions" to protect his parental rights and, if his informal efforts to establish a relationship fail, "he must rapidly turn to legal recourse so that the child may obtain a final placement as quickly as possible." *Id.* at 96-98, 1131-33. In requiring an unwed father to "act, and act quickly" to preserve his parental rights, our supreme court has emphasized the need for a "prompt determination of where and by whom [a] child is to be raised and nurtured." *Id.* at 97, 876 P.2d at 1132. In other words, to avoid a finding of abandonment, an unwed father must be both prompt and persistent in his actions. *Cf. Michael J.*, 196 Ariz. 246, ¶ 25, 995 P.2d at 687 (abandonment by incarcerated, married father; "The burden to act as a parent rests with the parent, who should assert his legal rights at the first and every opportunity."). Here, based on Jose's own testimony, he never has provided financial support for J.L., did not investigate enforcement of his legal rights until November 2008, when Jose was six years old, and did not establish his paternity until September 2009, nearly nine months after he received notice of the dependency petition.

¶17 Moreover, although the juvenile court properly may have considered abandonment in the context of Jose's incarceration during the first fourteen months of J.L.'s life, and again from 2004 until 2007, "His incarceration alone . . . does not justify a failure to make more than minimal efforts to support and communicate with his child."

Michael J., 196 Ariz. 246, ¶ 21, 995 P.2d at 686. Jose does not dispute evidence that, after J.L. was born, he had no contact with Tina or J.L. until he was released from prison in October 2003. Thus, like the father in *Michael J.*, Jose "took none of the actions even an incarcerated parent can take to establish some bond or connection with a child." *Id.* ¶ 24 (affirming finding of abandonment where incarcerated father made no attempt to communicate with or inquire about son and failed to provide support, "however minimal it might have been").

¶18 Based on undisputed evidence and Jose's own testimony, ADES maintains it established a prima facie case that Jose already had abandoned J.L. before the child's second birthday.[5] Although we are inclined to agree, we do not reweigh the evidence, *Denise R. v. Ariz. Dep't. of Econ. Sec.*, 221 Ariz. 92, ¶ 5, 210 P.3d 1263, 1265 (App. 2009), and therefore remand the case to the juvenile court to determine whether ADES established the ground of abandonment under the standards articulated above.

Conclusion

¶19 We vacate the juvenile court's August 13, 2010, order denying ADES's motion to terminate Jose's parental rights and remand the case for further proceedings consistent with this decision. In doing so, we recognize that circumstances may have

[5]To establish a prima facie case under § 8-531(1), ADES was required to show Jose had failed for a period of six months to maintain a normal parental relationship with J.L. "without just cause." Jose testified he began visiting J.L. after his release in 2003, but then became uncomfortable about visiting in the home of Tina's new boyfriend, and "some time went by" before he attempted to visit J.L. "right before his second birthday" in August 2004, discovered Tina and her boyfriend had moved, and was unable to locate the couple through family and friends. Jose was returned to prison the following month and remained incarcerated until sometime in 2007. When asked why he had not taken steps to establish his paternity after J.L. was born, Jose stated he did not know he was required to do so. Similarly, Jose testified he knew he had an obligation to support his son before CPS case manager Shirley Sorenson requested support payments in February 2010, but no one had asked him to do so and he "didn't know if it was required of [him] at the time." When asked why he had not sent any support payments in response to Sorenson's request, he "guess[ed] [he had] just been putting it off" while hoping to obtain custody of J.L.

changed since initiation of this appeal. On remand, the court is not required to ignore such circumstances in deciding whether termination is currently in J.L.'s best interests.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge